Neutral Citation Number: [2020] EWHC 803 (Comm)

Case No: CL-2018-000535

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2020

Before:

MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

SHANGHAI SHIPYARD CO. LTD.

Claimant

- and -

REIGNWOOD INTERNATIONAL INVESTMENT (GROUP) COMPANY LIMITED **Defendant**

- and-

OPUS TIGER 1 PTE LTD.

Part 20 Defendant

- -
- -

James M Turner QC and Peter Stevenson (instructed by **SCA Ontier LLP**) for the **Claimant**
Zoe O'Sullivan QC and Harry Wright (instructed by **Onside Law**) for the **Defendant**

Hearing date: 4 December 2019
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Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Robin Knowles J:

Introduction

1. This is the Court's judgment on the trial of two preliminary issues.

2. The Claimant ("the Builder") and the Defendant are parties to a contract entitled "Irrevocable Payment Guarantee" dated 17 November 2011 ("the Guarantee", an abbreviation the parties have been content to use in the course of argument).

3. The Guarantee was given to secure a final payment of US$170 million ("the Final Instalment") by the buyer under a shipbuilding contract dated 21 September 2011 ("the Contract") in respect of a drillship, Hull No S6030 ("the Vessel").

4. The Defendant was originally the buyer under the Contract. It was replaced as buyer by the Part 20 Defendant ("the Buyer") by a Novation Agreement dated 30 November 2012. The Buyer is an indirect subsidiary of the Defendant ("the Guarantor").

5. The Buyer did not take delivery of the Vessel under the Contract. Its position was that the Vessel was not deliverable. The Builder claimed the Final Instalment from the Buyer and then on 23 May 2017 made a demand on the Guarantor under the Guarantee.

6. An arbitration was commenced under the Contract on 13 June 2019. If successful on the preliminary issues, the Guarantor seeks a stay of the proceedings in this Court pending the resolution of the arbitration.

7. The preliminary issues concern the nature of the Guarantee and the circumstances in which payment is required.

The Guarantee

8. The Guarantee is governed by English Law.

9. The Guarantee includes these provisions:

> "1. In consideration of [the Builder] entering into [the Contract] with [the Buyer] … for the construction of [the Vessel], [the Guarantor] hereby IRREVOCABLY, ABSOLUTELY and UNCONDITIONALLY guarantee[s] in accordance with the terms hereof, as the primary obligor and not merely as the surety, the due and punctual payment by [the Buyer] of the Final [I]nstalment of the Contract Price amounting to … US$170,000,000 … .
>
> …

3. [The Guarantor] also IRREVEOCABLY, ABSOLUTELY and UNCONDITIONALLY guarantee[s], as primary obligor and not merely as surety, the due and punctual payment by [the Buyer] of interest on the Final Instalment guaranteed hereunder at the rate of … (5%) per annum from and including the first day after the default until the date of full payment by [the Guarantor] of such amount guaranteed hereunder.

4. In the event that [the Buyer] fails to punctually pay the Final Instalment guaranteed hereunder in accordance with the Contract or [the Buyer] fails to pay any interest thereon, and any such default continues for a period of fifteen (15) days, then, upon receipt by [the Guarantor] of [the Builder's] first written demand, [the Guarantor] shall immediately pay to [the Builder] or [the Builder's] assignee all unpaid Final [I]nstalment, together with the interest as specified in paragraph (3) hereof, without requesting [the Builder] to take any further action, procedure or step against [the Buyer] or with respect to any other security which you may hold.

In the event that there exists dispute between [the Buyer] and the Builder as to whether:

(i) [The Buyer] is liable to pay to the Builder the Final Instalment; and

(ii)The Builder is entitled to claim the Final Instalment from [the Buyer],

and such dispute is submitted either by [the Buyer] or by [the Builder] for arbitration in accordance with Clause 17 of the Contract, [the Guarantor] shall be entitled to withhold and defer payment until the arbitration award is published. [The Guarantor] shall not be obligated to make any payment to [the Builder] unless the arbitration award orders [the Buyer] to pay the Final Instalment. If [the Buyer] fails to honour the award, then [the Guarantor] shall pay you to the extent the arbitration award orders.

…

7. [The Guarantor's] obligations under this guarantee shall not be affected or prejudiced by:

(a) any dispute between [the Builder] and [the Buyer] under the Contract; …

…

(c) any variation or extension of their terms thereof; …

…

10. The maximum amount … that [the Guarantor is] obliged to pay to [the Builder] under this Guarantee shall not exceed the aggregate amount of … (USD171,416,666.67) being an amount equal to the sum of:

(a)The Final Instalment guaranteed hereunder …; and

(b)Interest at the rate of … (5%) per annum on the instalment for a period of sixty (60) days …"

11.All payments by [the Guarantor] under this Guarantee shall be made without any set-off or counterclaim and without deduction or withholding for or on account of any taxes, duties, or charges whatsoever …".

The preliminary issues

10. The preliminary issues are in these terms:

"[W]hether on the true construction of the Guarantee:

a. As regards the Guarantor's liability thereunder:

i. It is a demand guarantee, such that – subject to issue b. below – the Guarantor's liability thereunder arose upon and by reason of the Demand, whether or not the Buyer was liable to pay the Final Instalment under the terms of the Contract; or

ii. It is a "see to it" guarantee or a conditional payment obligation, such that – subject again to the issue set forth in b. below – the Guarantor's liability thereunder arose upon the Demand only if the Buyer was liable to pay the Final Instalment under the terms of the Contract.

b. The Guarantor is entitled to refuse payment under Clause 4 pending and subject to the outcome of the arbitration between [the Builder] and [the Buyer] in respect of a dispute as to the Buyer's liability to pay and [the Builder's] entitlement to claim that Final Instalment –

i. Only if the arbitration has been commenced between those parties as at the date the Demand is made; or

ii. Regardless of when such arbitration is or may be commenced?"

Background, context and approach

11. Mr James Turner QC and Mr Peter Stevenson for the Builder emphasize the importance of demand guarantees in modern commerce, and their particular value in the context of international shipbuilding contracts.

12. They point out that the credit exposure of a shipbuilder to a buyer in relation to a final instalment of payment under a shipbuilding contract can be particularly significant where the buyer is a special purpose company whose sole asset is the shipbuilding contract.

13. Mr Turner QC and Mr Stevenson recognise that determining whether a guarantee is a demand guarantee can be difficult because there is significant commonality in the language used in the two different types of guarantee. As Longmore LJ observed in Wuhan Guoyo Logistics Group v Emporiki Bank of Greece [2014] 1 Lloyd's Rep 266 at [23], there are often "pointers in different directions".

14. In Autoridad del Canal de Panama v Sacyr CA and others [2017] EWHC 2228 (Comm) at [81] Blair J valuably distilled a number of principles from the authorities. These included the following:

> "(1) [A] first demand bond is in principle autonomous of the underlying contract – liability may arise simply on a conforming demand within the validity of the instrument. For this reason, it has been likened to a letter of credit … .
>
> (2) What the instrument is labelled, the incorporation of terms such as a principal debtor clause, or terms imposing primary liability, both of which are very common in guarantees of all kinds, and the use of words such as "on demand", may be of limited value in determining its legal nature. The practical question … is in substance whether the instrument is effectively payable on demand, with or without some supporting documentation: this can only be ascertained by examining its terms … .
>
> (3) … [T]he court approaches the task of construing it by looking at the instrument as a whole 'without any preconceptions as to what it is'. To take advance payment guarantees as an example, the issuance of such guarantees securing advance payments made by an employer to a contractor can be in either form - it depends on what the parties agreed … .
>
> … ."

15. The Guarantor is a parent company and not a bank. It appears it is not simply a parent company, for in other proceedings in Singapore it has described itself as offering investment services. Even taking that into account the context here is not, or at least is not squarely, a banking context. In Marubeni Hong Kong and South China Ltd v Government of Mongolia [2005] 1 WLR 2497 at [30] the Court of Appeal had regard to the fact that the transaction there considered was outside the banking context. The absence of language in an instrument to describe it "in terms appropriate to a demand bond or something having similar effect" created, "in a transaction outside the banking context", "a strong presumption against" interpretation as a demand bond in the view of the Court.

16. There are, inevitably, differences between the instrument under consideration in Marubeni and the instrument here. There is force in Mr Turner QC's point that in the shipbuilding industry the function of an instrument can be the same whether issued by

a bank or a parent company. Any presumption can "more readily give way to language that indicates the contrary" where the context is a transaction in the nature of a financing transaction: see Bitumen Invest AS v Richmond Mecantile Ltd FZC [2017] 1 Lloyd's Rep 219 at [17] (Sir Jeremy Cooke).

17. I approach the contractual interpretation of the Guarantee in line with well-known appellate authority, including as marshalled and explained by Lord Hodge JSC in Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173 at [10]-[15] and as valuably summarized by Popplewell J (as he then was) in Lukoil Asis Pacific Pte Ltd v Ocean Tankers (Pte) Ltd [2018] EWHC 163 (Comm); [2018] 1 Lloyd's Rep 654 at [8]. Guided by these authorities, I have regard to the points of background and context discussed above and I turn next to the language.

Examining the language of the Guarantee

18. Clauses 1 and 3 of the Guarantee are indicative of a primary obligation on the part of the Guarantor. However terms imposing a primary obligation are very common in guarantees of all kinds as Blair J noted in Panama. And as Blair J put it, at [89] ".. to say that someone is primarily liable begs the question of the content of that primary liability …".

19. The substance of the first preliminary issue is not a choice between labels "demand guarantee" or "'see to it' guarantee" used in the formulation of the preliminary issue, or between primary liability and secondary liability, but whether the Guarantee has the characteristics described at a.i. in the first preliminary issue.

20. Clause 4 of the Guarantee includes the language "… upon receipt by us of your first written demand, we shall immediately pay to you or your assignee all unpaid Final Instalment …". Mr Turner QC emphasizes this language and adds that there is no provision requiring a request that the Builder take any or further action, procedure or step against the Buyer.

21. However the language emphasized by Mr Turner QC from Clause 4 does not stand alone in the Guarantee. The preceding words of Clause 4 provide that the obligation to pay (and the procedure for a written demand to be made), applies only "[i]n the event that [the Buyer] fails to punctually pay the Final Instalment guaranteed hereunder in accordance with the Contract or [the Buyer] fails to pay any interest thereon, and any such default continues for a period of fifteen (15) days". In drawing attention to this, prompted by Mr Turner QC's emphasis, I do not overlook the point that even a demand guarantee "can hardly avoid making reference … to the circumstances in which a demand may be made …" (Paget's Law of Baking 15th edition at para 35.8).

22. It is the case that Clause 7 of the Guarantee provides that the Guarantor's obligations under the Guarantee "… shall not be affected or prejudiced by (a) any dispute between … the Builder and [the Buyer] under the Contract; …". But this cannot be read without regard also to the latter part of Clause 4, which does affect the

Guarantor's obligations "[i]n the event that there exists dispute between [the Buyer] and the Builder".

23. These provisions in Clause 7(a) and Clause 4 are not in conflict, or if they are it is a conflict that can be resolved. There may be a "dispute between … the Builder and [the Buyer] under the Contract" which has no relevance to the Final Instalment, and in that situation Clause 7(a) is clearly engaged. Clause 4 on the other hand goes on to make clear it refers only to a dispute "as to whether (i) [the Buyer] is liable to pay to the Builder the Final Instalment; and (ii) The Builder is entitled to claim the Final Instalment from [the Buyer]", and one that "is submitted either by [the Buyer] or by [the Builder] for arbitration in accordance with Clause 17 of the Contract". Where the dispute is over the liability to pay and the entitlement to claim the Final Instalment then Clause 7(a) is, without real difficulty, to be read as subject to what has been provided in Clause 4.

24. The presence of the part of Clause 4 just discussed forms part of the overall review of the language of the Guarantee, but I accept it does not itself decide or determine the nature of the Guarantee. Mr Turner QC notes the provision in the Advance Payment Guarantees considered by Beatson J and the Court of Appeal in Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV [2010] EWHC 3362 (Comm); [2011] 1 All ER (Comm) 1047 at [24]; [2011] EWCA 827; [2011] 2 CLC 827 and held to be demand guarantees. Blair J took the same approach to the provision considered in WS Tankship II BV v The Kwangju Bank Ltd and Others [2011] EWHC 3103 (Comm) at [116]. This language of this part of Clause 4 is also very close indeed to the language of "the Proviso" in refund guarantees considered by Carr J in Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd [2015] EWHC 999 (Comm) 123 and held to be demand guarantees. In those guarantees Carr J found (at [72] – [80]) that the Proviso "fell to be considered separately" and went to "timing, not substance".

25. Mr Turner QC presses a contention that this part of Clause 4 is only consistent with the Builder's case. He advances three reasons to support that contention. First, he argues, a limited opportunity is given for the Guarantor to delay payment that otherwise must be made immediately. However, the Guarantee says in terms that the Guarantor "shall not be obligated to make any payment to [the Builder] unless the arbitration award orders [the Buyer] to pay the Final Instalment". Second, he argues, the arbitration is not to be between the Guarantor and the Builder. However, the position could readily be the same under a 'see to it' guarantee. Third, he argues, "the Guarantee responds to the award, regardless of the position between the underlying parties". However, although I appreciate the point that the award is a document, the award is nonetheless a decision on what the position is between the underlying parties. At least in some contexts this may not go as far as actively to support an argument that a particular instrument is a 'see to it' guarantee (see the Bank of China case (above) at [77]-[78], the Kwangju Bank Ltd case (above) at [116] and Meritz (above) at first instance at [74] and [76]), but that is not the same as saying that a provision on the lines of this part of Clause 4 is only consistent with an instrument being a demand guarantee (as defined in a.i. in the preliminary issue).

26. Mr Turner QC points out that in providing a limit to the Guarantee in the amount of the Final Instalment plus 60 days interest, Clause 10 of the Guarantee specifies a defined

amount that the Guarantor is able to calculate without reference to the underlying Contract and does not secure "the many other and varied obligations of [the Buyer]". Examples of those other obligations owed by the Buyer under the contract are the supply of items, the purchase of surplus consumable stores, and the payment of costs of mooring and removing the Vessel on delivery.

27. In my judgment, Clause 10 takes the inquiry no further. Its purpose is to provide security for the Final Instalment rather than other obligations. The question at issue is as to the nature of that security. Terms imposing a quantified limit to a guarantee are of course very common in guarantees of all kinds. It is also relevant to keep in mind that the figure in Clause 10 is a "maximum amount"; the obligation to pay under Clause 4 is "…all unpaid Final Instalment, together with the interest …".

28. Mr Turner QC and Mr Stevenson draw attention to the similarity of provisions within Clause 1, 3, 4, 7 and 10 and those of the instrument construed in Wuhan and held by the Court of Appeal to be a demand guarantee. As they properly recognize, in Wuhan itself Longmore LJ expressed the view (at [22]) that reference to numerous authorities is not necessarily helpful when the Court has to deal with the specific instrument before it. In any event the instrument in Wuhan did not have all of the language of Clause 4 discussed above. The inclusion of that language has significance also for the interpretation of Clause 7, again as discussed above. These are material differences, even before one combines any assessment of the weight given to the banking context that did exist in Wuhan.

Wuhan and "Paget's presumption"

29. It is nonetheless important to approach the language of the Guarantee in line with the guidance given by the Court of Appeal in Wuhan. At [25] – [26] Longmore LJ explained that commercial parties:

> ".... will need some assistance from the courts in determining their obligations. The only assistance which the courts can give in practice is to say that, while everything must in the end depend on the words actually used by the parties, there is nevertheless a presumption that, if certain elements are present in the document, the document will be construed in one way or the other.
>
> It is exactly this kind of assistance that the editors of Paget's Law of Banking have endeavoured to provide. In the 11th edition of that work these words appeared under the heading of "Contract of Suretyship v demand guarantee":
>
> > "Where an instrument (i) relates to an underlying transaction between the parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written') and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee.

…

> In construing guarantees it must be remembered that a demand guarantee can hardly avoid making reference to the obligation for whose performance the guarantee is security. …""

30. Longmore LJ described this (at [28]) as "Paget's presumption". In the case before them (a case that "[t]he judge did not find … particularly easy and neither do I", observed Longmore LJ at [23]) the Court of Appeal declined to follow the analysis of Christopher Clarke J because, as Longmore LJ put it (at [32]), "he ought in my respectful view to have had much more regard to the presumption than he did", in the interests of "a consistency of approach by the Courts, so that all parties know where they stand".

31. It is here that, in contrast to the facts of Wuhan, the fact that the Guarantee was not issued by a bank takes the present case out of the "presumption" derived from the distinguished banking textbook. The textbook in its current edition has added the words "or other financial institution" to element (ii) of the presumption. It has also, by a footnote, drawn attention to the fact that the presumption has been applied to a bond issued by an insurance company in the ordinary course of its business (Caterpillar Motoren GmbH & Co KG v Mutual Benefits Assurance Co [2015] EWHC 2304 (Comm) at [20] per Teare J). These amplifications do not bring the present case within element (ii) of the presumption.

32. I do not suggest that the "Paget's presumption" is intended to be applied simply by a process of "ticking a box" against each of the four elements, rather than by using the four elements to help reach an understanding of the instrument in question. However the significance of the fact that an instrument is not issued by a bank, financial institution or insurance company in the ordinary course of its business (ie the significance of the absence of element (ii)), may be underlined by looking at what is left with the three remaining elements.

33. The first remaining element ("(i) relates to an underlying transaction between the parties in different jurisdictions") cannot take things too far. The next ("(iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written')") may be, as Blair J observed in Panama (above), "of limited value" in determining the legal nature of an instrument. The final remaining element ("(iv) does not contain clauses excluding or limiting the defences available to a guarantor") is also what one would expect to find in the case of a 'see to it' guarantee that intended to leave intact the defences available to a guarantor, although I appreciate the likelihood of this intention will depend on the context. Ultimately, looked at in this way, the three factors are not necessarily a powerful combination.

34. Consistently, the current edition of Paget suggests (at footnote 3 to section 35.8) that where an instrument is not given by a bank or other financial institution "[c]ogent indications that the instrument was intended to operate as a demand guarantee will be required …". Treating this as part of the assistance offered by the textbook to commercial parties, and having regard to the Court of Appeal's guidance on the

importance of consistency, the absence of indications of that strength or quality is material, and adverse to the Builder's contention.

35. All this is material to the present case where, in my judgment, the language of the Guarantee does not make the grade of a demand guarantee without the help of a presumption, and where no presumption is successfully engaged.

Conclusion on the first issue

36. Examining the terms of the Guarantee in the present case, with appropriate regard to background and context, and with the benefit of argument from the Builder and the Guarantor, I have reached the conclusion that the Guarantee is a 'see to it' guarantee.

The second issue

37. Even if the Guarantee is a 'see to it' guarantee, the Builder contends that on its true construction Clause 4 operates only as a defence to a claim under the Guarantee if arbitration is commenced before demand is made.

38. Mr Turner QC argues that any alternative construction leads to an uncommercial result because the Guarantor would be given "two opportunities to litigate lability under the Contract" and could delay payment unduly. First, it can defend a claim brought under the Guarantee on grounds that no sums were due from the Buyer because, for example, the Vessel was not deliverable. Second, at any time prior to judgment on that claim, it can "engineer the commencement of arbitration under the Contract" which (on the Guarantor's construction) would release it from its obligation to make payment under the Guarantee unless and until an arbitration award is published.

39. I understand the thrust of the argument, given the corporate connection between the Guarantor and the Buyer in this case, but it should be noted that the first of the "two opportunities" involves litigation by the Guarantor and the second involves arbitration by the Buyer.

40. For the Guarantor, Ms Zoe O'Sullivan QC and Mr Harry Wright argue that there is nothing in the wording of Clause 4 which limits its application to the case where the arbitration has already been commenced before demand has been made.

41. The language used by the parties requires "that there exists dispute between [the Buyer] and the Builder … and such dispute is submitted either by [Buyer] or by [the Builder] for arbitration in accordance with Clause 17 of the Contract". When that is the position the Guarantor is "entitled to withhold and defer payment until the arbitration award is published" and "shall not be obliged to make any payment to the Builder unless the arbitration award orders [the Buyer] to pay the Final Instalment". In that

event "[i]f [the Buyer] fails to honour the award, then [the Guarantor] shall pay you to the extent that arbitration award orders."

42. Having considered the arguments carefully, I see no basis in the language of the Guarantee for an interpretation that the parties intended that the benefit of these arrangements would not apply or would be taken away permanently unless the dispute had been submitted to arbitration before a demand was made under the Guarantee.

43. I cannot see that the commercial parties would contemplate that what should matter was being first to arbitration or to demand. Ms O'Sullivan QC notes, relevantly, that the arbitration clause in the Contract contains a provision (the words "which cannot be settled amicably") contemplating that an attempt to settle a dispute amicably should precede arbitration. Mr Turner QC is right that there is not a full tiered dispute resolution clause requiring an attempt to settle to precede arbitration. Nonetheless the provision still contra-indicates a framework that invites hastening to arbitration before demand. The concern identified by Mr Turner QC that there could be delay by there being litigation followed at a late stage by arbitration, is at least partly addressed by the ability of the Builder to submit the dispute to arbitration at a suitable early point.

44. Mr Turner QC argues that an obligation on the part of the Guarantor to pay will already have accrued if the commencement of the arbitration follows the making of the demand. He adds that if the Guarantor has already actually paid after a demand then a repayment obligation cannot be imposed if an arbitration follows. These two points, he contends, are in favour of an interpretation of Clause 4 that would place outside that clause an arbitration that is not commenced before the demand is made.

45. However the clause deals at least with the former point, even if not perfectly. It provides that payment may be deferred and withheld, and that there is no requirement to make payment unless the award (in due course) orders the Buyer to pay the Final Instalment. As to the second point, I prefer not to express a view in this judgment, given the limited argument I heard on this, on the question whether and in what circumstances there could be a repayment obligation. It is sufficient if I indicate that I do not consider it reliable to assume the question would have been in the contemplation of the parties when agreeing the clause and the Guarantee.

Conclusion on the second issue

46. In my judgment, on the true construction of the Guarantee the Guarantor is entitled to refuse payment under Clause 4 pending and subject to the outcome of an arbitration between the Builder and the Buyer in respect of a dispute as to the Buyer's liability to pay and the Builder's entitlement to claim that Final Instalment, regardless of when such arbitration is or may be commenced.

Disposal

47. Subject to any points arising I will make an Order in terms to be discussed in relation to the preliminary issues and on the application to stay the proceedings pending the resolution of the arbitration.